FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 6, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2005-1-M A.C. No. 47-00219-36708
v.	:	
VULCAN CONSTRUCTION MATERIALS, L.P., Respondent	:	Sussex Quarry

DECISION

Appearances: Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Robert Stadler, Supervisor of Safety and Health, Vulcan Construction Co., Romeoville, Illinois, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Vulcan Construction Materials, L.P. (Vulcan). The petition seeks to impose a total civil penalty of $120.00 for two alleged non-significant and substantial (non-S&S) violations of the mandatory safety standard in section 56.12067, 30 C.F.R. § 56.12067, governing the installation of transformers. Generally speaking, a violation is properly designated as non-S&S if it is unlikely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

The hearing in this proceeding was conducted on May 18, 2005, in Milwaukee, Wisconsin. At the hearing page 2-2 of MSHA's Electrical Inspection Procedures Handbook was proffered by Vulcan and identified as Respondent's Exhibit 14. The record was left open for submission of Chapter 2 of the handbook in its entirety. Chapter 2 was admitted as "Resp. Ex. 14" on June 10, 2005, at which time the record was closed. The parties' post-hearing briefs are of record.

I. Statement of the Case

The issue in this proceeding is the applicability of section 56.12067 to two outside transformers at Vulcan's limestone quarry. The transformers are installed 4 feet above the

ground. The pertinent provision of section 56.12067 requires transformers installed less than 8 feet from the ground to be surrounded by a fence that is at least 3 feet from energized transformer wires. The cited wires are less than 3 feet from the fence. Section 56.12067 does not require energized transformer wires or other parts to be surrounded by a fence if the transformer is elevated at least 8 feet above the ground because of the unlikelihood of accidental contact. The question in this case is whether the subject energized wires that are 12 feet above ground level violate section 56.12067. For the reasons discussed below, the citations shall be vacated because the cited energized wires do not constitute a violation of the safety standard since they are not accessible to inadvertent contact.

II. Findings of Fact

Vulcan operates a limestone quarry located in Waukesha, Wisconsin. The quarry was inspected by Mine Safety and Health (MSHA) Inspector Frank Taylor on March 30, 2004. Taylor observed two outside transformers, also known as substations. A transformer converts high voltage energy into lower voltage that is used to energize mine operations. The transformers cited by Taylor were used to provide energy to the primary crusher and the C2 tower. The primary crusher is the site of the initial limestone crushing process. The C2 tower is a screening tower where the material is sized, and from which the product is conveyed to different stockpiles.

Section 56.12067 requires the transformers at both the primary crusher and the C2 tower to have perimeter fencing because they are installed less than 8 feet above ground level. Specifically, each transformer is situated on a flatbed trailer that is raised approximately 4 feet above the ground. The dimensions of both trailer beds are 16 feet long by 8 feet wide. Both transformers sit on the wood floor of the trailers. The transformer structures are secured to the metal frame of the trailers with metal bolts.

The transformers are surrounded by chain link fences on three sides that measure 8 feet high from the base of the trailers. The fences are grounded and contain warning signs reflecting "high voltage." The fourth side of the substations are the motor control centers within which the transformer on-off controls are located. The Secretary concedes the chain link fences are "substantial" and that the transformers are fenced in accordance with section 56.12067. (Tr. 78, 142).

The tops of the fences at both locations are approximately 12 feet above the ground. There are metal frames at the tops of the fences. There are six parallel energized "bus wires" that are attached to the frames that extend at the top of the fences over the width of the truck bed.[1] Thus, the bus wires extend approximately 8 feet above the trailer beds, or 12 feet above the ground. The bus wires are approximately 12 feet long at the primary crusher location, and approximately 10 feet long at the C2 tower substation. The bus wires are less than the 16 foot length of the trailer beds because there are insulators at both ends of each bus wire that are approximately 2 feet long.

[1] There was a seventh bus wire at the C2 tower substation that was not energized.

At both substations, the outermost overhead bus wires running parallel to the 16 foot long fence-sides are approximately 1 foot from the fence. At both locations, the bus wires are approximately 2 feet from the 8 foot long fence-sides separated by the insulators on the ends of each bus wire.

The incoming bus wires carry 4,160 high volts phase to phase that is converted to 480 volts phase to phase carried through the outgoing bus wires. (Joint Stip. 9, 10). The bus wires are shielded with a heavy outer layer of insulation. Physical contact with a properly shielded, insulated bus wire does not present an electrocution hazard. (Tr. 220-24).

The bus wires are firmly secured to the metal frames. In the unlikely event that energized bus wires became dislodged and touched the fence, the fence could only become energized if the insulation on the bus wire was defective. Grounding of the fence makes the possibility of electric shock even less likely. (Tr. 237-39). As discussed below, the purpose of section 56.12067 is to prevent inadvertent contact with energized parts by individuals standing at ground level.

III. Further Findings and Conclusions

As a result of his observations, Taylor issued Citation Nos. 6162084 and 6162085 on March 30, 2004, for alleged substation violations of section 56.12067 at the primary crusher and C2 tower, respectively. Both citations noted that, "[a] miner coming into contact with any of these energized pieces or parts energized by them could be shocked, burnt or electrocuted." (Gov. Ex. 2, 6). Both citations noted access to the transformer areas was "restricted." Taylor characterized the alleged violations as non-S&S, reflecting that it was unlikely that the hazard contributed to by the cited conditions will result in an accident causing serious injury.

Section 56.12067 establishes the standards for the installation of transformers. Section 56.12067 provides:

> Transformers shall be totally enclosed, or *shall be placed at least 8 feet above the ground*, or installed in a transformer house, *or surrounded by a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wiring*.

(Emphasis added).

The Secretary asserts the evidence supports the occurrence of the violations of section 56.12067 by virtue of the close proximity of the 12 feet high bus wires to the outside fences, even though the standard permits energized wires that are 8 feet above ground level to be totally unprotected in appropriate circumstances. Obviously, the Secretary's theory in this case warrants further scrutiny.

The Secretary asserts that her "enforcement actions are consistent with the clear language of the standard." (*Sec'y br.* at p.14). While it is true that the language in section 56.12067 concerning "a substantial fence at least 6 feet high and at least 3 feet from any energized parts, casings, or wiring," is unambiguous, the analysis does not stop there. For it is well settled that application of a safety standard must harmonize with its intended purpose. *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Moreover, the Secretary's attempt to enforce a regulatory standard that is unambiguous should be precluded if such enforcement would lead to an absurd result. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987), see also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

While a literal reading of section 56.12067 might suggest a violation based on the facts of this case as the bus wires were within 3 feet of the fence, a regulation's intended purpose must be considered before blind application of its provisions. Unfortunately, that is not what happened in this case:

The Court:	So what you're saying in essence [is] that the mandatory standard made you do it?
Inspector Taylor:	That's my job.

(Tr. 88).

In the final analysis, the weight accorded to an agency's application of its regulation depends "upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier . . . pronouncements . . . ." *Unites States v. Mead Corp.*, 533 U.S. 218, 228 (2001) *quoting Skidmore v. Swift*, 323 U.S. at 140.

Although the Secretary suggests otherwise, it is clear that section 56.12067 is not intended to ensure that energized parts do not contact perimeter transformer enclosures. In this regard, there are no clearance requirements in section 56.12067 for energized parts if transformers are located in a transformer house, or, if they are totally enclosed. Although Taylor opined that "things can go wrong" with a ground fault system, he conceded "the logic behind" section 56.12067 was to prevent persons from inadvertent contact with energized parts. (Tr. 77-78).

Significantly, Chapter 2 of the MSHA "Electrical Inspection Procedures Handbook" (Handbook) also reflects the purpose of section 56.12067 is to protect against inadvertent contact. The Handbook states:

> **C. Surface Transformer Station Guidelines**
>
> The interior of transformer stations, both in a fenced enclosure or transformer vault or house, must be designed to prevent any person from inadvertently contacting energized parts. Therefore, all wiring and other exposed energized parts must be installed at least 8 feet above the work area or walking surface.

> Otherwise the wiring, transformer bushings, or other exposed parts must be properly guarded to prevent accidental contact . . . .
>
> Shock Hazards, such as exposed energized parts or conductors that a person could accidentally contact in a high-voltage substation, are a violation of 30 C.F.R. 509(b).[2]

(Resp. Ex. 14, p.2-2).

The suspension of bus wires 12 feet above the ground precludes inadvertent contact. Consequently, the Secretary has failed to carry her burden of demonstrating that the facts in this case constitute a violation of the cited mandatory standard.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 6162084 and 6162085 **ARE VACATED**. Accordingly, **IT IS FURTHER ORDERED** that this civil penalty matter **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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/mh

[2] Section 77.509(b), which applies to surface coal mines, is similar in scope to section 56.12067. It requires transformer stations to be enclosed "to prevent persons from unintentionally or inadvertently contacting energized parts."